Supreme Court of the United States

OCTOBER TERM, 1946

No. 764
INTERSTATE HOTEL COMPANY OF NEBRASKA,
Petitioner,
v.
REMICK MUSIC CORPORATION,
Respondent.

No. 765
PEONY PARK,
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v.
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v.
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Respondent.

No. 767
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Petitioner,
v.
JEROME KERN AND T. B. HARMS COMPANY,
Respondent.

MOTION FOR REHEARING OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT WITH SUPPORTING CASES.

WILLIAM J. HOTZ,
HOTZ & HOTZ,
1530-5 City National Bank Bldg.
Omaha, Nebraska
Attorneys for Petitioners.

COCKLE PRINTING COMPANY, LAW BRIEFS, OMAHA

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STATUTES AND CASES

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To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Statement of the Present Status of the Cases

1. The petition for the writ of certiorari on file presented among other things the validity of two sections

of a Nebraska state protective and regulatory act in reference to the public performance of copyrighted musical compositions. These sections were nullified by the federal courts below as violative of the federal Constitution and the National Copyright Act.

2. The petition for certiorari was filed on December 9, 1946. Certiorari was denied on January 20, 1947. Rehearing and a reconsideration based on the three points following are now requested.

I.

Under the ruling of Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, based on Sec. 725 U. S. C., and similar cases since decided, does not a saving clause statute in force in Nebraska, continuing all rights existing prior to repeal of the state statute, bind the federal appellate courts when considering the validity of the nullification of the state law?

1. Sec. 49-301, Revised Statutes of Nebraska for 1943, passed in 1913, was in full force and effect when the two sections of the state statute herein in question were declared invalid by the federal trial court. The statute was repealed before the case reached the Circuit Court. The Nebraska saving clause is as follows:

> "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute."

2. The petitioners therefore maintain that the United States Circuit Court of Appeals for the Eighth Circuit erred when it held (R. 328):

"• • • 'A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law.' Ziffrin, Inc., v. United States, 318 U. S. 73, 78, 63 S. Ct. 465, 469, 87 L. Ed. 621; Carpenter v. Wabash Railway Co. et al., 309 U. S. 23, 26, 27, 60 S. Ct. 416, 84 L. Ed. 454; Texas Co. v. Brown et al., 258 U. S. 466, 474, 42 S. Ct. 375, 66 L. Ed. 721; Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538, 541, 542, 61 S. Ct. 347, 85 L. Ed. 327; Hines v. Davidowitz, 312 U. S. 52, 60, 61 S. Ct. 399, 85 L. Ed. 581; Standard Oil Co. of Kansas et al. v. Angle et al., 5 Cir., 128 F. 2d 728, 730."

3. The question arises in the following manner: Infringement cases were brought by the respondents herein, as copyright proprietors, against the petitioners, who were music users in Nebraska. The respondents in the trial court were required by the trial court to state whether or not they had complied with the two sections of the Nebraska statute in question, which sections required the copyright proprietor to collect his public performance rights at the time the copyrighted musical compositions were sold in the state. The respondents, among other things, stated they did not comply with the sections because as a state statute it was unconstitutional under the federal Constitution and in violation of the National Copyright Act (R. 8-9).

4. The United States District Judge, in nullifying the sections of the state act, said in the opinion that he would follow the previous ruling on the same sections of the statute previously nullified in *Buck v. Swanson,* 33 F. Supp. 377, 387-8, by a three-judge federal court. The said trial court in the cases at bar accordingly said:

"* * * And since that court's view of the invalidity of that portion of the statute was so clearly expressed, it is now repeated and adopted. * * *" See opinion R. 40 to 42.

5. In the conclusions of law the trial court, in nullifying these two sections of the state statute, said (R. 80):

"XLVII—That Section 59-1303 Revised Statutes of Nebraska 1943, is a plain negation and frustration of the Federal Copyright Act and is unconstitutional, violating the due process and equal protection clauses of the Constitution and violative of the Copyright Act and constitutes an attempt to deprive the Federal Courts of jurisdiction in suits under Title 17 U. S. C. A. Section 34 and Title 28, U. S. C. A. Sec. 41 (1)(7) and, for these and other reasons, is null and void.

"XLVIII—That the failure of plaintiffs to comply with Section 59-1303 Revised Statutes of Nebraska 1943, is a right of plaintiffs since that section is void."

6. On appeal the United States Circuit Court of Appeals for the Eighth Circuit, on October 23, 1946 (157 F. 2d 744), upheld and affirmed the decision of the trial court below in the nullification of the state law, and added the above-quoted language from the opinion that a change in the law between a nisi prius and appellate court required the appellate court to apply the changed law. The Nebraska law was repealed after the judgments herein were entered. Thus an apparent error appears in these proceedings. Attention is again called in this motion for rehearing to that error, because if the state law was in force and was the *gravamen* of the petitioners' defense, then its nullification by a federal court gave petitioners the right to be heard in the Supreme Court of the United

States. The saving clause in the Nebraska state statute was overlooked by the Circuit Court, as was the decision of the Supreme Court of Nebraska in reference to the application of the saving clause, as will be seen in *Helfrich v. Baxter*, 128 Neb. 281, 258 N. W. 532.

7. It would seem, therefore, that the Supreme Court should reconsider for the purpose of this petition for rehearing that the sections of the state law were in full force and effect for the purpose of review when the law was nullified and the judgments entered in order to give full effect to the following points relied upon for relief on rehearing.

II.

Should not the petition for certiorari heretofore filed, be allowed, when it now appears from the record before the Supreme Court of the United States that a state statute was in full force and effect and was nullified by the United States District Court and affirmed by the United States Circuit Court of Appeals? Or should not Sec. 347(b) of the United States Code which provides for review in the event state laws are nullified by federal courts be now followed by the Supreme Court?

1. The entire Sec. 347 of the United States Code, being Judicial Code Sec. 240, amended, petitioners submit, should be by the Court now reconsidered in view of its explicit provisions for review confined to the federal question obviously before the Court. It was clearly stated in the petition for writ of certiorari heretofore before the Court, from pages 10 and 11 thereof, that the nullification of a state statute was made and set forth as grounds for granting the writ. The language copied from the petition is as follows:

> " * * * When the pertinent section of the Nebraska act was declared unconstitutional and nullified by a single federal judge and when the United States Circuit Judge who had previously nullified the same section and passed upon the question in the case, petitioners believe this Court should allow certiorari rather than remand the cases on the point.

2. Petitioners submit that Sec. 347(b), U. S. C., gives a right to them to have those sections of the state statute that were nulified by the federal court below, reviewed by the Supreme Court of the United States. The state law was in force at the time of hearing and entry of the judgments as above explained. The state saving clause kept the statute in full force. The federal trial court nullified the state act. The federal Circuit Court held that that the repeal of the state law in question pending appeal was the law of the case. The Circuit Court erred.

3. In the event a review is allowed by this Court on this point under this application for rehearing and a reconsideration of the petition heretofore filed, the review no doubt would be restricted to an examination and decision of the federal questions presented in the cases, as provided by the above-quoted federal statute.

4. Be that as it may, the state statute was in force under the Nebraska law and it was nullified by the Circuit Court. This result becomes now important because the petition for certiorari was denied, and this point of law should be given full effect in accordance with the Statute U. S. C. 347(b).

III.

Was there a violation of the last sentence of the United States Code, Sec. 216, in the cases at bar, which nullified the decision of the United States Circuit Court of Appeals for the Eighth Circuit, because that Court was improperly constituted? If so, should not an order of this Court be entered remanding these causes to the said Circuit Court for a hearing and final decision before a properly constituted Circuit Court?

1. This is a jurisdictional question. In the petition for certiorari the only reference to the point is set forth on pages 10 and 11 thereof. The point was not fully presented; and being jurisdictional, it may now be fully presented.

Sec. 216, U. S. C., Judicial Code Sec. 120, reads as follows:

> " * * * No judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals."

2. That section was passed many years ago because "the purpose of the provision is to make certain that the court shall be constituted of Judges uncommitted and uninfluenced by having expressed or formed an opinion in the court of first instance."

3. Because of the nature of these proceedings and the manner in which the question of the validity of these sections of the state statute in question has been brought before the federal court and nullified, petitioners submit they are entitled to the redress provided by law, i. e., to

have their causes reviewed by a properly constituted United States Circuit Court of Appeals. That right is petitioners' whenever it appears that a circuit judge was disqualified to sit because of his sitting in the district court on the same question and for all intents and purposes in the same cause. Those are the facts of record.

4. A brief historical sketch reviewing the record before the Court will illustrate petitioners' point.

5. The act in question was passed by the Nebraska legislature in 1937. The entire statute is found in the Revised Statutes of Nebraska 1943, Chapter 59, Article 13, and is appended in the appellants' (petitioners') brief in the Circuit Court. Copies of that brief were made available for the Supreme Court because it contained in the appendix the act in question and other data.

6. The American Society of Composers, Authors and Publishers, as shown by the records and files herein, is made up of the respondents in the cases at bar and other publishers and composers as its members. An action in 1937 was brought by the president of ASCAP for the Society and all its members, both composers and publishers, in the United States District Court in Nebraska. The suit was brought in equity to nullify the state act. The respondents in these cases at bar were such members who were thus plaintiffs in that action (*Buck v. Swanson,* 33 F. Supp. 377. *Marsh v. Buck,* Oct. term 1940; record on file in this Court, Vols. I and II, No. 312). The caption and address to the Court so shows. The defendant in that case was the State of Nebraska. The objective of that case was to nullify the law in all its parts, including the two sections herein in question, because in violation

of the National Copyright Act and the federal Constitution.

7. The state was made the party defendant through the governor and attorney general, as the representative of the citizens. They had no personal interest for the state in the matter. The state as such uses no music and is not interested in public performance for profit of copyrighted music, except as the public welfare was concerned and the police power of the state was protected. That action sought to restrain the enforcement because the act in all its parts was violative of the National Copyright Act and the federal Constitution.

8. Consequently a three-judge federal court was called together for the hearing. One United States Circuit Judge was called to sit with two United States District Judges. The opinion nullifying the two sections herein in question was written by that Circuit Judge and is found in 33 F. Supp. 377.

9. Thus the respondent music publishing houses herein were before those judges in that case. They were seeking particularly the nullification of the two sections of the Nebraska statute that related to themselves as music publishers and did so. The Circuit Judge acting in that case with the two District Judges, nullified the entire Nebraska statute upon the ground that the two sections now in question were in violation of the National Copyright Act and the federal Constitution. This plainly appears from the opinion in 33 F. Supp. 377, and the findings, conclusions, and decree therein. That case was appealed directly to the Supreme Court of the United States

as permitted by statute. Therefore, no parts of it were reviewed in the United States Circuit Court of Appeals.

10. The Supreme Court of the United States upon hearing reversed and dismissed the case. In so doing, the Court stated that the ASCAP organization, specifically calling it by that name, fell squarely within the purview of the act, and held that portion of the act a valid exercise of the state's police power. It did not specifically reverse the lower court's opinion on the invalidity of the two sections. The procedure was as follows:

12. The Supreme Court of the United States held as follows (*Watson v. Buck*, 313 U. S. 387, 405) after holding the monopoly section valid:

> " * * * All other questions remain open for consideration and disposition in appropriate proceedings."

The Court also held in *Marsh v. Buck*, 313 U. S. 406, 408:

> " * * * That part of the statute on which the court did not pass—and the part which the Attorney General said he stood willing to enforce if violated—set up a complete scheme for the regulation of combinations controlling performing rights in copyright music."

12. The contention of the respondents in its opposition to the petition for certiorari was that the Supreme Court did not pass upon the two sections of the state act. The reversal of the three-judge federal court below did have the effect of a remand on the two sections of the act. Assuming that position to be correct for the purpose of this rehearing, it is apparent, then, that the question of the legality of the decision of the three-judge federal

court in striking down the two sections of the state statute has never been reviewed by any appellate court, until in the cases at bar, when in the Circuit Court the same Circuit Judge sat as presided in the three-judge court which nullified those two sections as violative of the federal laws and constitution (33 F. Supp. 377, 157 F. 2d 744).

13. Promptly after the reversal by the Supreme Court of the United States in reference to this state statute on May 26, 1941, these members of ASCAP, being the respondents herein as music publishing houses, brought actions which would result in the test of the validity of those two sections of the Nebraska statute which the said Circuit Judge and the two District Judges had held violative of the state and federal statutes. In these actions at bar the identical sections were pleaded as a defense under the state statute by petitioners. The single United States District Judge sitting in the cases at bar nullified the sections, but upheld the monopoly section as the Supreme Court had upheld. The trial judge adopted the identical language from the opinion written by the presiding Circuit Judge in the aforementioned three-judge federal court. This opinion of the Circuit Judge on the three-judge court was quoted and adopted as the law of the cases at bar on the identical sections as applied to the identical music publishers.

The music users, petitioners herein as citizens of the State of Nebraska, then appealed their cases, which are the cases at bar, to the United States Circuit Court of Appeals for the Eighth Circuit. There the same United States Circuit Judge was the same Circuit Judge who had presided in the three-judge federal court, and who

wrote the opinion declaring the two sections of the Nebraska statute as violative of the Constitution of the United States and the National Copyright Act (157 F. 2d 744).

15. The petitioners sought certiorari in the Supreme Court by their petition filed on December 9, 1946, Oct. term 1946, Nos. 764-767. The petition was denied on January 20, 1947. It is therefore obvious, as petitioners believe, that there has been a violation of the last sentence of Sec. 216, U. S. C., Judicial Code Sec. 120, because of the sitting of the Circuit Judge on appeal in the cases at bar. The Circuit Court was therefore not properly constituted.

16. Petitioners' position is fortified by the case of *Moran v. Dillingham*, 174 U. S. 153, 19 S. Ct. 620, wherein the Supreme Court, speaking through Justice Gray, stated in reference to a similar question therein adjudicated under the same Judicial Code section:

> "The enactment, alike by its language and by its purpose, is not restricted to the case of a judge's sitting on a direct appeal from his own decree upon a whole cause, or upon a single question. A judge who has sat at the hearing below of a whole cause at any stage thereof is undoubtedly disqualified to sit in the circuit court of appeals at the hearing of the whole cause at the same or at any later stage. And as 'a cause,' in its usual and natural meaning, includes all questions that have arisen or may arise in it, there is strong reason for holding that a judge who has once heard the cause, either upon the law or upon the facts, in the court of first instance, is thenceforth disqualified to take part, in the circuit court of appeals, at the hearing and decision of the cause or of any question arising therein. But, how-

ever that may be, a judge who has once heard the cause upon its merits in the court of first instance is certainly disqualified from sitting in the circuit court of appeals on the hearing and decision of any question in the same cause which involves in any degree matter upon which he had occasion to pass in the lower court."

17. The Supreme Court in *Cramp v. International Curtis Marine Turbine Co.*, 228 U. S. 645, 33 S. Ct. 722, 724, said:

"* * * Conceding, however, that the asserted consent was given, the error of the conclusion based upon it is conclusively demonstrated by the construction long since affixed to the statute, and quite recently reiterated and enforced in Rexford v. Brunswick-Balke-Collender Co. supra. Indeed, as pointed out in the Rexford Case, the comprehensive and inflexible character of the prohibition was intended to prevent resort to consent of the party or parties as a means of qualifying a judge to participate in the decision of a case in the circuit court of appeals, when, without such consent, because of the prohibition of the statute, he would be disqualified from so doing,—a purpose whose public policy is not difficult to understand.

"* * * Under such circumstances we think, as pointed out in Lutcher & M. Lumber Co. v. Knight, 217 U. S. 257, 267, 268, 54 L. ed. 757, 761, 762, 30 Sup. Ct. Rep. 505, our duty is not to hold the case upon the docket, for ultimate decision upon the merits, but to at once reverse and remand it to the court below, so that the case may be heard by a competent court, conformably to the requirements of the statute."

18. Petitioners also cite *Rexford v. Brunswick-Balke-Collender Co.*, 228 U. S. 339, 33 S. Ct. 515, referred to in the foregoing quotation.

19. Jurisdiction could not have been conferred as shown by the foregoing cases, upon the Circuit Court of Appeals for the Eighth Circuit, in the instant cases, by consent of counsel. Nor has there been a waiver or an estoppel by failure to object to the Circuit Judge sitting when the cases were reached, nor would a failure to file a motion for a rehearing on the grounds now urged, remedy the error, because the Circuit Court was no court at all for any decision on the questions involved.

20. The sections of the Nebraska statute here in question were attacked before the Circuit Judge sitting as an appellate court, upon the same point, i. e., that the sections of the state statute herein in question were passed in violation of the National Copyright Act and the federal Constitution. This is exactly the same question on the same statute and the same parties, even though by representation, as previously were before the same judge when the statute was attacked in the injunction proceedings.

21. On this point the cause should be remanded to the Circuit Court of Appeals for hearing before a properly constituted court.

CONCLUSION

In conclusion, petitioners request a reconsideration and a determination:

1. That for all intents and purposes the two sections of the Nebraska state statute were and are in full force and effect because of the Nebraska saving clause statute and the decision of that state in reference thereto; that

the United States Circuit Court of Appeals for the Eighth Circuit erred in holding that by the repeal of the Nebraska state statute, pending appeal, the appellate court must follow the law as changed.

2. That the petition for certiorari be considered by the Supreme Court of the United States as a petition for review under U. S. C., Sec. 347(b), Judicial Code Sec. 240(b), amended; that the petition for writ of certiorari disclosed the nullification of the state statute by a federal court on federal grounds; that petitioners are entitled to a review upon that point within the limitations of said section.

3. That the United States Circuit Court of Appeals for the Eighth Circuit was illegally constituted, for the reasons set forth under Point III above; that in the event Point II hereof is denied, then as a last alternative petitioners submit that the cause should be referred to a properly constituted United States Circuit Court of Appeals for the Eighth Circuit.

4. Petitioners pray for such other and further relief as may be just and equitable in the premises.

Counsel for petitioners certify that this motion for rehearing and reconsideration is presented in good faith and not for delay.

Respectfully,

William J. Hotz,
Hotz & Hotz,
1530-5 City National Bank Bldg.
Omaha, Nebraska

Attorneys for Petitioners.

Counsel for petitioners move this Court to consider the impropriety of the brief filed by counsel for respondents in "Opposition to Petition for Writ of Certiorari."

1. Counsel for petitioners deny each and every one of the statements made in the brief of respondents filed in opposition, which charge counsel for the petitioners with deliberate misstatement of the record. These charges appear on pages 30 to 34 of respondents' brief. The accusations were made in cases pending before this Court. The record will disclose the true facts.

2. The language of the accusation and denunciation directed against counsel for petitioners and used throughout much of opposing counsel's brief (pp. 30 to 34), even though grounded on facts, would subject the writers of the accusations to disciplinary action by this Court.

3. Recently the American Bar Association, under its section of "Legal Education of the Practicing Law Institute," Roscoe Pound, General Editor, issued this statement:

> "There are certain amenities which every lawyer is entitled to expect from his adversary, and which should be accorded to him. One of them is gentlemanly respect and consideration. Briefs should not abound in reckless characterizations of one's adversary or his client. Charges of fraud, chicanery, false statement, etc., as well as intemperate language in describing contentions as absurd, ridiculous, nonsensical, etc., are as unbecoming and undignified as they are unconvincing and ineffectual. Invective and characterization are no substitutes for proof and argument. A much more persuasive method is to state the facts and make the demonstrations which establish

falsity in the adversary's contentions, and let the Court draw the indicated inferences and conclusions."

4. We respectfully submit that the foregoing rule of conduct for counsel has been violated. Sec. 5 of Rule 2 of the Supreme Court of the United States has been violated.

5. Counsel for petitioners invite the Court to determine the propriety of the statements made on pages 30-34 of the brief in opposition.

6. During the trial below in the cases at bar, counsel for petitioners was apparently too indulgent with opposing counsel. Proof is found in the opinion of the trial court (58 F. Supp. 522, 536):

> " * * * The court forbears to express or discuss the uncomplimentary opinion which it entertains touching the deportment, during the taking of depositions, of certain attorneys representing the plaintiffs, who presumptuously and arbitrarily directed witnesses to refuse to answer questions. But those incidents occurred well before the trial of the cases; and, though they would have warranted disciplinary action against the offending individuals or summary ruling touching the further prosecution of the cases by the plaintiffs involved, the defendants did not elect seasonably to seek such remedies or either of them. So, without approving or condoning the misconduct of the offending attorneys, the court will not, at this late date, allow an incident, or even several incidents, of that character to intercept a ruling in these cases upon their merits."

7. This quotation directs this Court's attention to the recorded facts that it has been the custom of the attorneys representing the respondents and their organiza-

tions in these cases to indulge in practices that should be condoned by no court.

8. The conduct of opposing counsel in writing the last pages 30-34, of their "Brief in Opposition" before this Court, is in violation of the Rules of Practice of this Court as above stated. Consequently, the Court's attention is directed to the matter for such action as this Court may wish to pursue in the premises.

9. Counsel for petitioners in the interests of enforcing the Rules of Conduct for attorneys appearing before this bar will proceed further if directed by the Court.

10. The evidence of the misconduct of counsel for respondents is before the Court in their brief prepared by them for respondents and which are on file with the Clerk of this Court.

Respectfully,

WILLIAM J. HOTZ,

HOTZ & HOTZ,
1530-5 City National Bank Bldg.
Omaha, Nebraska

Attorneys for Petitioners.

Dated at Omaha, Nebraska, this 11th day of February, 1947.